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IN THE

Supreme Court of the United States

..... TERM, 1968

No. [redacted] 143

In the Matter of the Application of

BRUNS, NORDEMAN & Co., a Limited Partnership,

Petitioner,

against

AMERICAN NATIONAL BANK AND TRUST COMPANY,

Respondent,

and

THE EXCHANGE CORP., MAURICE BENJAMIN and EDWARD H. LEVITT,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DAVID J. COLTON,
SPENCER PINKHAM,
Attorneys for Petitioner,
120 Broadway,
New York, N. Y. 10005.

Of Counsel,
COLTON & PINKHAM.

INDEX

	PAGE
Citations to Opinions Below	2
A. In the District Court	2
B. In the Court of Appeals	3
Jurisdiction	4
Questions Presented	5
Statement	5
Reasons for Granting the Writ	7
A. The application raises an important question of Federal Law	7
B. Such question has never been determined by this Court	8
C. There is a conflict between the Court of Appeals for the Second Circuit and the United States District Court for the District of New Jersey	9
D. Section 94 of the National Bank Act and the venue provisions of the Securities Acts are in irreconcilable conflict and, therefore, under well established rules of statutory construction, the latter must prevail	9
E. The Congresses which enacted the Securities Acts must have intended to modify NBA § 94	10
Appendix A—Opinions Below	13
Decision—United States District Court, Southern District of New York	13
Opinion—United States Court of Appeals, Second Circuit	15
Appendix B—Statutes	23

STATUTES

PAGE

National Bank Act § 94 [12 U.S.C. § 94] throughout-printed 23

Securities Act of 1933 § 3 [15 U.S.C. § 77(c)] 11

Securities Act of 1933 § 5 [15 U.S.C. § 77e] 4, 5, 23

Securities Act of 1933 § 12 [15 U.S.C. § 77l].....4, 5, 11, 24

Securities Act of 1933 § 17(a) [15 U.S.C. § 77q(a)]..4, 5, 24

Securities Act of 1933 § 22(a) [15 U.S.C. § 77v(a)] throughout-printed 25

Securities Exchange Act of 1934 § 7 [15 U.S.C. § 78g] 11

Securities Exchange Act of 1934 § 10(b) [15 U.S.C. § 78j(b)] 4, 5, 25

Securities Exchange Act of 1934 § 12 [15 U.S.C. § 78 1] 11

Securities Exchange Act of 1934 § 27 [15 U.S.C. § 78aa] throughout-printed 26

Rule 10b-5 .....4, 5, 26

DECISIONS

Friedman v. Bintliff (67 Civ. 3661, S.D.N.Y. Nov. 8, 1967, not reported) 8

G. E. Credit Corp. v. James Talcott, Inc., 271 Fed. Supp. 699 (S.D.N.Y. 1966) 3, 9

Levin v. Great Western Sugar Co., 274 Fed. Supp. 974 (D.N.J. 1967) 3, 9, 10

Mercantile National Bank v. Langdeau, 371 U. S. 555 (1963) 4, 8, 9

PAGE

Michigan National Bank v. Robertson, 372 U. S. 579 (1963) 4, 8, 9

Silver v. New York Stock Exchange, 373 U. S. 341 1963 ..... 9, 10

Wyndham Associates v. Bintliff (67 Civ. 2611, S.D.N.Y. Nov. 8, 1967, not reported) 8

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THE EXCHANGE CORP., MAURICE BENJAMIN and EDWARD H. LEVITT,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the determination by the United States Court of Appeals for the Second Circuit, dated April 19, 1968, in the above-entitled case, which affirmed an order of the District Court for the Southern District of New York, dismissing the complaint as to Respondent, a national bank established in the Northern District of Illinois, upon the ground that Section 94 (12 U.S.C. § 94) of the National Bank Act*

* The pertinent provisions of all statutes referred to are printed in Appendix B hereto, page 23, *et seq.*

(NBA) precludes suit against a national bank, except in the district in which it is "established". The mandate of the Court of Appeals was issued May 16, 1968.

Petitioner contends that § 22(a) [15 U.S.C. § 77v(a)] of the Securities Act of 1933 (the 1933 Act) and § 27 [15 U.S.C. § 78aa] of the Securities Exchange Act of 1934 (the 1934 Act), under which acts this action is brought, have effected a partial repeal or modification of, and should prevail over, NBA § 94 as to actions under the Securities Acts. It is an important question of federal law which has not been settled by this Court.

Citations to Opinions Below

A. In the District Court.

On November 6, 1967 the Honorable Sylvester J. Ryan, United States District Judge for the Southern District of New York, filed a Memorandum Opinion (Appendix A, p. 13, *infra*) dismissing this action as to Respondent on the sole basis of NBA § 94.

That portion of NBA § 94, here involved was first enacted in 1863. It provides that suit against a national bank "*may* be had in any district * * * in which such association may be established." § 22(a) of the 1933 Act and § 27 of the 1934 Act provide in substance that suits thereunder may be initiated in the district in which the "sale" or the "violation" occurred. The sale and violation complained of herein occurred in the Southern District of New York.

Judge Ryan held that NBA § 94 is mandatory and has not been affected by the later venue provisions of the Securities Acts. He recognized that there were two irreconcilable and directly conflicting prior decisions on the subject—the first by Judge Tenney in the Southern Dis-

trict of New York [*G. E. Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (1966)], and a later decision by Judge Coolahan in the District of New Jersey [*Levin* v. *Great Western Sugar Co.*, 274 F. Supp. 974 (September, 1967)]. In *G. E. Credit Corp.*, Judge Tenney dismissed an action against a national bank located in another district on the basis of NBA §94. In *Levin*, Judge Coolahan disagreed and denied a similar motion, saying,

> "After a full consideration of the issues presented, I must decide to the contrary. Section 78aa impliedly repeals Section 94 for cases involving Securities Exchange Act violations by national banks."

Judge Ryan chose to follow *G. E. Credit Corp.* decided in his own district.

The judgment and order (22a)* contain the "express determination that there is no reason for delay" and the "express direction for the entry of judgment" called for by Rule 54 of the Federal Rules of Civil Procedure, so that immediate appeal could be taken to the Court of Appeals.

B. In the Court of Appeals.

The Court of Appeals [Chief Judge Lombard, Circuit Judge Friendly and District Judge Blumenfeld] affirmed (Appendix A, p. 16, *et seq.*, *infra*). Judge Friendly, writing for the unanimous Court, pointed out that,

> "A federal court of appeals is here confronted for the first time with an issue that has provoked a difference of opinion among the district courts."

He made it plain that the Court affirmed "with regret" and that "if we were writing on a clean slate", the re-

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* Parenthetical numerical references followed by "a" are to the Appendix to the Brief of Plaintiff-Appellant in the Court of Appeals.

sult would have been different. The opinion points out that actions under the Securities Acts (p. 18, *infra*) "are typically multi-defendant" and that this "was doubtless an important reason for the liberal venue provisions" of such Acts; that (p. 18, *infra*) if Respondent had been an Illinois bank or trust company, instead of a national bank, it could have been sued in New York, where the sale took place; that "of all the fagots in plaintiff's bundle, the national character of appellee's incorporation is surely the least important", and that its decision would surely result in "heavy inconvenience for the plaintiff", whereas the burden on Respondent of defending in New York, along with its co-defendants, would be "slight in this age of cheap long distance telephone rates, efficient methods for copying documents, and jet air transport". Judge Friendly referred to the dissent by Mr. Justice Black joined in by Mr. Justice Douglas of this Court in *Michigan National Bank* v. *Robertson*, 372 U. S. 579 (1963), in which it was stated that application of NBA § 94 "would require a plaintiff to go to another State hundreds of miles from home to bring a suit for a wrong done him in a transaction in his own State, a result which I cannot believe Congress intended".

However, the Court of Appeals felt constrained to affirm by reason of language in *Michigan National Bank, supra*, and *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963), neither of which involved a conflict with the venue provisions of either Securities Act or any other federal statute.

Jurisdiction

Jurisdiction is grounded upon §§ 5, 12(l), 17(a) and 22(a) of the 1933 Act [15 U.S.C. §§ 77e, 77l(i), 77q(a) and 77v(a)] and §§ 10(b) and 27 of the 1934 Act [15 U.S.C. §§ 78j(b) and 78aa] and Rule 10b-5.

Questions Presented

The only questions which will be argued in this Court if this Petition be granted, as stated by the Court of Appeals, are pp. 16, 21, *infra*):

> "Do the special and properly wide venue provisions of the Securities Act of 1933 [Sec. 22(a), 15 U.S.C. §77v(a)] and the Securities Exchange Act of 1934 [Sec. 27, 15 U.S.C. §78aa] overcome the special and exceedingly narrow venue provisions of the National Bank Act of 1864 [§94, 12 U.S.C. §94]?"
>
> • • • • • •
>
> "The question rather is whether, given the seventy years of highly restricted venue of actions against national banks, there is sufficient reason to think that the Congresses which enacted the 1933 and 1934 securities legislation intended to carve out an exception for claims under the securities laws?"

In different form:

> Are the venue provisions of the Securities Acts and National Bank Act in irreconcilable conflict, so that the later Securities Acts should prevail over the earlier National Bank Act in litigations under the Securities Acts?

Statement

The complaint (3a, *et seq.*) asserts a conspiracy among the four defendants, including Respondent, to distribute 10,000 unregistered shares of common stock of Canaveral International Corporation (Canaveral) in violation of §§5, 12(l) and 17(a) of the 1933 Act and §10(b) of the 1934 Act and Rule 10b-5 thereunder.

Petitioner is a registered broker-dealer and a Member of the New York and American Stock Exchanges and other national securities and commodity exchanges.

Defendant Edward H. Levitt is a resident of Louisiana, who purchased the 10,000 shares of unregistered stock of Canaveral from a controlling person to whom he gave an investment letter.

Respondent is a Chicago national bank which loaned Mr. Levitt $65,000 on the pledge of his Canaveral Shares as security, and thereafter received a letter (12a) from Canaveral, dated May 16, 1967, stating that the 10,000 shares which it held as collateral for its loan to Levitt were unregistered, were not free for sale and would not be transferred by Canaveral if presented.

Defendant Exchange Corp. is a Florida corporation which was a customer of petitioner.

Defendant Maurice Benjamin, a resident of New York, is president and principal stockholder of, and controls, Exchange Corp.

The complaint alleges that about April 24, 1967 Levitt entered into an agreement (11a) with Benjamin, pursuant to which Benjamin agreed to buy, and then to sell upon the open market, the 10,000 shares of Canaveral at not less than $6.50 per share, pay off Levitt's debt to Respondent bank with the proceeds, and divide any excess; that Benjamin caused Exchange to direct Petitioner to sell 10,000 shares of Canaveral for its account on the market and accept delivery of the certificates therefor from Respondent; that Petitioner executed such order and sold 10,000 shares for the account of Exchange Corp.; that on May 28, 1967, Respondent, despite its knowledge that the shares were not registered and would not be transferred, guaranteed Levitt's signature and sent his certificates to Petitioner with draft for $65,000 attached; that Petitioner, innocent of any knowledge or suspicion that any of the shares were not fully registered and free for sale, paid the draft, accepted delivery and sent the certificates to the transfer agent for Canaveral for transfer into its

"street" name, so that delivery could be made to the purchasers of the 10,000 shares sold; that Petitioner was thereupon advised by Canaveral, not only that the shares were unregistered and would not be transferred, but that it had so notified Respondent more than ten days before.

Petitioner then returned the shares to Respondent and demanded repayment of its $65,000; Respondent refused; Petitioner was therefore forced to "cover" in order to make delivery of the shares sold; since the market price had risen in the meantime, Petitioner sustained a loss, including the $65,000 paid to Respondent, of $73,353.43.

The documentation (11a *et seq.*) annexed to the complaint makes it clear that the defendants, with full knowledge of the unregistered status of the shares, conspired to distribute them to the public through the Petitioner.

Reasons for Granting the Writ

A. The application raises an important question of Federal law.

During the seventy years between the enactment of NBA § 94 and the Securities Acts, virtually the entire development of the securities industry took place and national banks became deeply involved therein. The Controller of the Currency estimated (N. Y. Times, Sunday, March 3, 1968, Section 3) that, as at December 31, 1966, the securities investment portfolios alone of banks (pension funds, personal trusts, estates and investment advisory accounts) equalled 210 billion dollars. National banks are engaged in an interstate securities business involving thousands of shares daily.

The Court of Appeals points out (p. 16, *infra*) that the question has been recently raised and decided, one way or the other, in three cases besides the instant case and Respondent, in its brief in the Court of Appeals, pointed

to two further unreported cases decided by Judge Ryan on the basis of *G. E. Credit Corporation*, to wit; *Wyndham Associates* v. *Bintliff*, 67 Civ. 2611, and *Friedman* v. *Bintliff*, 67 Civ. 3661 (S.D.N.Y., Nov. 8, 1967).

As the involvement of national banks in securities transactions continues to increase and actions under the Securities Acts continue to proliferate, it would seem certain that national banks will be frequent and appropriate parties to such litigations.

Securities litigations are generally multi-defendant. The instant case is typical. There is no district, other than the Southern District of New York, in which all parties may be joined under the venue provisions of the Securities Acts. If this application be denied, or the decision of the Court of Appeals be affirmed, Petitioner will be forced to sue Respondent in Illinois and the other three alleged conspirators in New York. Indeed, conflicting decisions may well result. The heavy burden which will be placed thereby upon the courts, counsel and litigants would seem clear.

The public and the Bar need to know finally whether all parties defendant in a securities litigation may be joined under the venue provisions of the Securities Acts or whether a national bank may be sued only in the district in which it is established.

B. Such question has never been determined by this Court.

This Court has held in *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555, and again, in *Michigan National Bank, supra*, that the portion of NBA § 94, added in 1864 and providing, "or in any State, county or municipal court in the county or city in which the association is located", is mandatory and precludes suit in a State court, except in the county or city in which the bank is located. But never has the 1863 portion of NBA § 94, relating to federal court venue, been challenged in this Court on the basis of con-

flict with another federal venue statute. Different holdings in *Mercantile National Bank* or *Michigan National Bank* might have involved direct judicial repeal of a clear federal statute—although Justices Black and Douglas did not think so. But nothing in holding or language of either case relates to the effect of a later conflicting federal venue statute.

C. There is a conflict between the Court of Appeals for the Second Circuit and the United States District Court for the District of New Jersey.

There can be no doubt about the conflict between the decision of the Court of Appeals herein and the decision by Judge Coolahan in *Levin, supra.*

D. Section 94 of the National Bank Act and the venue provisions of the Securities Acts are in irreconcilable conflict and, therefore, under well established rules of statutory construction, the latter must prevail.

The conflict between Judge Tenney in *G. E. Credit Corp.* and Judge Coolahan in *Levin* meets at this point. Judge Tenney, citing this Court's decision in *Silver* v. *New York Stock Exchange,* 373 U. S. 341 (1963), pointed out that repealers by implication are not favored; that reconciliation should be accomplished if possible, and that modification of NBA § 94 was not essential to make the Securities Acts "work". He, therefore, held that § 94 prevails. Judge Coolahan, on the other hand, pointed out that the Court was concerned only with the venue provisions of the three Acts; that such venue provisions were in direct and irreconcilable conflict; that under NBA § 94, the action could be brought only in the home districts of the defendant national banks, whereas, under the Securities Acts, it could be brought in New Jersey, where the transaction complained of occurred.

There is no question about the rule of statutory construction that where two statutes are in conflict and, as

here, there is nothing in committee report or Congressional debate to throw light on the subject, the later statute will prevail.

We urge that the reasoning of this Court, as we understand it, in *Silver* v. *New York Stock Exchange, supra,* constitutes the touchstone. In that case, the conflict was between the 1934 Act and the earlier Sherman and Clayton Acts. This Court held that where the "particular instances of Exchange self-regulation" fell "within the scope and purposes of the Securities Exchange Act", the Stock Exchange would be protected by the 1934 Act and the provisions of that Act would prevail over the earlier anti-trust laws. However, this Court held that, since the 1934 Act contained no general exemption therefrom, the anti-trust laws would continue to apply to transactions which were not within the perimeter of the provisions of the 1934 Act.

Accordingly, we urge the soundness of the reasoning of Judge Coolahan. The provisions in respect of the districts in which an action under the Securities Acts may be initiated, are well within the perimeter of those Acts and Congress must have intended that, in Securties Acts litigations, the venue provisions of such Acts would apply.

To hold that NBA § 94 applies to the Securities Act litigation is not to "reconcile" the statutes; it is to hold that the earlier statute prevails over the later statute.

E. The Congresses which enacted the Securities Acts must have intended to modify NBA § 94.

Under the conditions existing in 1933 and 1934 in respect to the securities industry, transportation and communications, no reasons existed for permitting national banks to be immune from the venue provisions of the Securities Acts.

In *Levin, supra,* Judge Coolahan said (274 F. Supp. at p. 978):

> "But another reason compels my decision here. A quick examination of the 1933 and 1934 securities acts

> will reveal that on a number of occasions the legislative draftsmen found fit to exempt national banks and their securities from the provisions of the act. See 15 U.S.C. §77(c)(a)(2),* 15 U.S.C. §77(1)(2),** 15 U.S.C. §78(1)(i).*** It becomes clear that the legislative draftsmen knew about national banks when writing their securities acts, and knew how to except them from provisions of the acts when they chose to do so. It would be a usurpation of legislative prerogatives for this court to impute an exception from the 1934 act, in view of the background just described. I find the venue provision of the 1934 Act to be the relevant one for purposes of considering defendant banks' motion to dismiss."

It should also be noted that Section 7 of the 1934 Act (15 U.S.C. §78g), which deals with credit restrictions applies to banks and, indeed, that the Federal Reserve System has promulgated Regulation U, which regulates the lending by banks for the purpose of acquiring or carrying securities pursuant to the authority granted thereby.

Since the Congress was obviously aware of the involvement of banks in the securities industry when it enacted the Securities Acts, we urge that, if it intended to exempt any banks from the venue provisions of such Acts, it would have said so. Certainly, under conditions existing in 1933 and 1934, it could not have intended that national banks be

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* 77c(a)(2), § 3 of the 1933 Act; exempts stocks of regulated banks.

** 77 1(2), § 12(2) of the 1933 Act; provides for civil actions but retains exemption of regulated bank stocks.

*** 78 1(i), § 12 of the 1934 Act; providing for registration of securities upon national exchanges and reports to be filed; vesting regulatory powers over reporting by specified banks with the Comptroller of the Currency, the Federal Reserve System and the Federal Deposit Insurance Corporation.

exempted from the venue provisions of the Securities Acts and all other persons, including all other banks, be subjected thereto.

We urge that this application be granted.

Respectfully submitted,

DAVID J. COLTON,
SPENCER PINKHAM,
Attorneys for Petitioner.

Of Counsel,
COLTON & PINKHAM.

May 24, 1968.

APPENDIX A

Opinions Below.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

BRUNS, NORDEMAN & Co. v. THE EXCHANGE CORP. et al.

Endorsement

67 Civ. 2408

RYAN, D.J.

Defendant AMERICAN NATIONAL BANK AND TRUST COMPANY (the Bank) has moved to dismiss this suit as to it on the ground of improper venue.

It is not disputed that the Bank is a national bank and has its principal office and place of business in Chicago. Dismissal is sought by the Bank under the venue provisions of Title 12 U.S.C. Section 94. The Bank contends it can be sued only in the Northern District of Illinois.

Plaintiff asserts jurisdiction under Sections 12 and 17 (Title 15 U.S.C. Sections 77e, 77-1(1) and 77q) of the Securities Act of 1933 and Section 10b (Title 15 U.S.C. Section 78j) of the Securities Exchange Act of 1934 and Rule 10b-5. We assume for the purposes of this motion that this Court has jurisdiction of the subject matter of the complaint and that the complaint states a claim for relief under the law cited.

Plaintiff does not ask that the suit be severed and transferred to the Northern District of Illinois should we conclude that venue is improperly laid in this District as to the Bank.

The question presented is whether the terms of Section 94 of the National Bank Act or the venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 are controlling as to the claims pleaded.

Decision.

We have concluded that Section 94 of the National Bank Act is still mandatory and has not been impliedly repealed or modified by any section or provisions of the 1933 or 1934 Acts. We accept in toto the conclusions and reasoning of our brother Judge Tenney in G.E. Credit Corp. v. James Talcott Inc. et al, 271 F. Supp. 699. We are not unmindful of the decision of our learned brother Judge Coolahan of the District of New Jersey in Levin v. Great Western Sugar Co. (Civil No. 683-67, D.N.J., September 29, 1967).

Motion granted; complaint dismissed as to defendant Bank for improper venue; let an order be settled so providing.

Dated: November 6, 1967.

SYLVESTER J. RYAN,
U.S.D.J.

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 344—September Term, 1967.

(Argued March 20, 1968 Decided April 19, 1968.)

Docket No. 31987

BRUNS, NORDEMAN & Co., a Limited Partnership,

Plaintiff-Appellant,

—v.—

AMERICAN NATIONAL BANK AND TRUST COMPANY,

Defendant-Appellee,

and

THE EXCHANGE CORP., MAURICE BENJAMIN and EDWARD H. LEVITT,

Defendants.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY, *Circuit Judge,* and
BLUMENFELD, *District Judge.**

Appeal from a judgment of the District Court for the Southern District of New York, Sylvester J. Ryan, *Judge,* dismissing for lack of venue so much of a complaint under the Securities Act of 1933 and the Securities Exchange Act

* Of the District Court of Connecticut, sitting by designation.

of 1934 as related to a national bank established in Chicago, Illinois. Affirmed.

SPENCER PINKHAM (Colton & Pinkham, New York, N. Y.; David J. Colton, of Counsel), *for Plaintiff-Appellant.*

JOHN R. HUPPER (Cravath, Swaine & Moore, New York, N. Y.; Edwin A. Kilburn, of Counsel), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

A federal court of appeals is here confronted for the first time with an issue that has provoked a difference of opinion among district courts: Do the special and properly wide venue provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 overcome the special and exceedingly narrow venue provisions[1] of the National Bank Act of 1864? Judge Ryan, in the District Court for the Southern District of New York, here followed the opinion of Judge Tenney of that district that they do not, *General Electric Credit Corp.* v. *James Talcott, Inc., and Franklin National Bank,* 271 F. Supp. 699 (1966), a view also adopted, as an alternative ground of decision, by Judge Horowitz in the Northern District of Illinois, *Berman* v. *Thomson and The First National Bank of Boston, et al.,* 65-C-2051, not officially reported. The opposite position was taken by Judge Coolahan of the District of New Jersey in *Levin* v. *The Great Western Sugar Company and Colorado National Bank of Denver, et al.,* Civ. No. 683-67, not officially reported. We conclude with regret

[1] The statutory history is recounted in *Mercantile Nat'l Bank* v. *Langdeau,* 371 U. S. 555, 558-61 (1963).

that the rulings upholding the claim of prevalence of the 1864 statute are right.

The complaint, summarily stated, alleged a conspiracy among four defendants to effectuate, in violation of §§ 5, 12(1) and 17(a) of the Securities Act of 1933 and § 10(b) of the 1934 Act, the sale of 10,000 shares of unregistered common stock of Canaveral Corporation, owned by defendant Levitt, apparently a Louisianian, and pledged by him to the defendant, American National Bank and Trust Company, "established" in Chicago. The conspiracy was to be accomplished as follows: Levitt was to sell the shares to Benjamin, president and principal owner of The Exchange Corporation, a Florida corporation, which was to pay Levitt out of the proceeds of a resale. Exchange was a customer of plaintiff, a New York broker-dealer. Pursuant to Exchange's instructions plaintiff sold the 10,000 shares in New York and sent the bank its draft for $65,000. The bank received this and forwarded to New York certificates for the shares, although knowing they were not registered and could not be sold without violating § 5 of the 1933 Act. The transfer agent for Canaveral refused to accept the certificates for transfer and plaintiff had to cover in a rising market, thereby sustaining a total loss (including the $65,000 payment) of $73,353.43. On motion of the Chicago National Bank Judge Ryan dismissed the complaint against it and entered the language appropriate for making the judgment final under F. R. Civ. Pr. 54(a).

Section 94 of the National Bank Act, originally adopted in 1864, 13 Stat. 99, 116, provides, so far as pertinent, that suits against a national bank

> "may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which the association is located."

Section 22(a) of the Securities Act of 1933 provides that any suit or action to enforce any liability or duty created by the Act

> "may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant, or wherever the defendant may be found."

Section 27 of the Securities Exchange Act of 1934 contains a provision with like or, indeed, even broader effect.

The contention that the provisions of the securities legislation should be read as overcoming the historic venue limitation whereby national banks can be sued only where "established" or "located" has much practical appeal. Plaintiff points out that actions wherein banks are sued for violation of the securities laws are typically multi-defendant actions, as illustrated by this case and the three others cited. Recognition of the probable multi-defendant character of securities suits was doubtless an important reason for the liberal venue provisions of § 22(a) of the 1933 Act and § 27 of the 1934 Act, in contrast to the restrictive requirement of the general venue statute, § 51 of the Judicial Code of 1911, 36 Stat. 1087, 1101, whereby federal question actions could be brought only in the district of which the defendant was an inhabitant. See also § 50. If appellee had been an Illinois stock bank or trust company, plaintiff could have joined it in this action since the sale took place in New York. Of all the fagots in plaintiff's bundle, the national character of appellee's incorporation is surely the least important. Compare *Liberty Natl. Bank & T. Co.* v. *Buscaglia*, —— N. Y. —— (1968)*; *First Agricultural Na-*

* 21 N. Y. 2d 357.

tional Bank v. *State Tax Comm.*, 36 L. W. 2106 (Mass. Sup. J. Ct. 1967), appeal docketed, 36 L. W. 3244 (U. S. Oct. 2, 1967) (No. 755). Yet under the view upheld by the district judge, the plaintiff must resort to Illinois to sue appellee; it is exceedingly doubtful whether the 1933 Act would allow him to sue the other defendants there since the unlawful "offer or sale" apparently occurred in New York;[2] and the Illinois action could not be transferred to the Southern District of New York under 28 U. S. C. § 1404(a) since it could not "have been brought" in that district. The result thus is heavy inconvenience for the plaintiff and a burden for the federal courts, as against the burden on appellee—slight in this age of cheap long distance telephone rates, efficient methods for copying documents and jet air transport—of defending an action in New York rather than Chicago. While some of these factors also ease the burden of plaintiff in suing in Chicago, there remains the serious difficulty in proceeding there against the other defendants.

If we were writing on a clean slate, we would not find it difficult to reconcile § 94 of the National Bank Act with § 22(a) of the Securities Act. Since § 94 reads in terms of permission rather than prohibition, it would not be a great feat of construction to read this as fixing venue only when an applicable venue statute placed this on the basis of being a "resident" or "inhabitant," and not as proscribing other places of suit when the venue statute permitted this where an act was done. Such apparently was the view of Mr. Justice Black, joined by Mr. Justice Douglas, in *Michi-*

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[2] The situation would be different under § 27 of the 1934 Act which gives venue "in the district wherein any act or transaction constituting the violation occurred." *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195, 204-05 (5 Cir. 1960), cert. denied, 365 U. S. 814 (1961). However, although the complaint sets forth a claim under § 10 of the 1934 Act, this might well be subject to motion.

gan Nat'l Bank v. *Robertson*, 372 U. S. 591, 594-95 (1963). But equally apparently, this was not the view taken by the majority in that case and in the slightly earlier one of *Mercantile Nat'l Bank* v. *Langdeau* 371 U. S. 555 (1963). True those decisions concerned the portion of § 94, added in 1864, 13 Stat. 991, permitting suits in certain state courts and not the portion, stemming from § 59 of the Act of 1863, 12 Stat. 665, providing that suits "may be had in any district or territorial court of the United States held within the district in which such association may be established," and on the one occasion when the issue seems to have been squarely presented to the Supreme Court, it placed its decision in favor of the bank on lack of jurisdiction, and said it had "no occasion to consider" the issue of venue. *Bank of America* v. *Whitney Central Nat'l Bank*, 261 U. S. 171, 173 (1923). However, this court has given a construction to the clause of § 94 dealing with the venue of suits in a federal court quite as Draconian as the Supreme Court has done with respect to the state court clause, *Leonardi* v. *Chase Nat'l Bank*, 81 F. 2d 19, cert. denied, 298 U. S. 677 (1936), the Seventh Circuit has followed us, *Buffum* v. *Chase Nat'l Bank*, 192 F. 2d 58 (1951), cert. denied, 342 U. S. 944 (1952), and it would indeed strain language to say that the same verbs were merely permissive with respect to suits in federal courts although prohibitory as to actions in state ones.

The Supreme Court has emphatically held that where Congress has dealt with a particular venue problem—here actions against national banks—broader language in a general venue statute will not overcome this even though literally applicable. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222 (1957). Indeed, appellant apparently concedes that the present general venue statutes, 28 U. S. C. §§ 1391(a) and (b), would not overcome

§ 94 of the National Bank Act even if it did not contain the words "except as otherwise provided by law."[3] Its contention is rather that the venue clauses of the two securities acts are themselves "special" venue statutes, and that in such a case the latter prevails. We think it inappropriate to resolve the issue so mechanically. The question rather is whether, given the seventy years of highly restricted venue of actions against national banks, there is sufficient reason to think that the Congresses which enacted the 1933 and 1934 securities legislation intended to carve out an exception for claims under the securities laws.

Nothing in the legislative history of the venue provisions of the 1933 and 1934 Acts indicates that Congress had given thought to the status of national banks. This is not surprising. National banks, under extensive supervision by the Comptroller of the Currency, were hardly envisioned as likely defendants in actions under the new securities laws. In fact, the House Committee Report reveals that Congress expressly relied on the Comptroller when, in the 1933 Act, it exempted securities of national banks from the requirement of registration, § 3(a)(2),[4] and, even more significantly, from civil liability for fraud in their distribution. § 12(2). H. Rep. No. 85, 73 Cong., 1st Sess. 14 (1933). Such prospects as that a national bank as pledgee might knowingly participate in the attempted sale of an unregis-

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[3] These words in the 1948 revision supplanted narrower language in § 51 of the 1911 Code, 36 Stat. 1087, 1101.

[4] It was only in 1955 that the Commission, reversing more than 20 years of contrary practice, limited § 3(a)(2) exemptions to issues of the bank's own securities and held that American Depository Receipts against outstanding foreign securities issued by a bank must be registered. 22 SEC Ann. Rep. 43 (1956). While this decision was undoubtedly sound on policy grounds, see 1 Loss, Securities Regulation 564-65 (1961), review of the legislative history indicated that Congress did not specifically consider this problem, see Loss, *supra*, at 564 n. 18.

tered security, as here alleged, or that by acting as an intermediary in an exchange offer a national bank might join in a violation of § 10(b) of the 1934 Act were hardly in Congress' mind. Moreover, if the problem had occurred to Congress, we cannot be at all certain how that body would have wished it resolved; the Comptroller of the Currency now stoutly opposes the broad venue rule which the SEC advocates, see *General Electric Credit Corp.* v. *James Talcott, Inc., supra,* at 701. Concededly the case is not one where adherence to § 94 of the National Bank Act prevents a suit against such a bank for violation of the securities legislation from being brought anywhere—a situation that led to the carving out of an exception to § 94 for "local actions." See *Casey* v. *Adams,* 102 U. S. 66 (1880). Here suit against the bank in Chicago is not impossible but simply inconvenient. Appellant's case thus does not measure up to the standards laid down in *United States* v. *Borden & Co.,* 308 U. S. 188, 198-99 (1939), see also *Silver* v. *New York Stock Exchange,* 373 U. S. 341, 357 (1963), to justify a holding of repeal—even partial repeal—by implication. Granted that the situation calls for remedy, this lies in Congress, whether by specification in the venue sections of the securities laws, by a more general overhaul of § 94 of the National Banking Act, see *Mercantile Nat'l Bank* v. *Langdeau, supra,* 371 U. S. at 563, or both.

Affirmed.

APPENDIX B

Statutes.

Sec. 94 of the National Bank Act, Title 12, U.S.C. § 94.

"Venue of Suits.

Actions and proceedings against any association under this Chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." (Portion in italics enacted 1863; portion not italicized enacted in 1864.) 12 Stat. 681, 13 Stat. 116-117.

Sec. 5 of the Securities Act of 1933, Title 15 U.S.C. § 77e:

"(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale."

Sec. 12 of the Securities Act of 1933, Title 15 U.S.C. § 77l:

"Any person who—

(1) offers or sells a security in violation of section 5," . . .

"shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security."

Sec. 17(a) of the Securities Act of 1933, Title 15 U.S.C. § 77q(a):

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Sec. 22(a) of the Securities Act of 1933, Title 15 U.S.C. § 77v(a):

"(a) The district courts of the United States, the United States courts of any Territory, and the Dis-

trict Court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this title. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Sec. 10(b) of the Securities Exchange Act of 1934, Title 15 U.S.C. § 78j(b):

"'It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . .'"

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Sec. 27 of the Securities Exchange Act of 1934, Title 15 U.S.C. § 78aa:

"'* * * Any criminal proceeding may be brought in the district wherein any act or transaction constitut-

ing the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

Rule 10b-5. EMPLOYMENT OF MANIPULATIVE AND DECEPTIVE DEVICES.

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of a security."

SUPREME COURT U. S.

Office Supreme Court, U.S.
FILED
AUG 29 1968

No. 143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

BRUNS, NORDEMAN & CO.,
Petitioner,

vs.

AMERICAN NATIONAL BANK AND TRUST COMPANY,
Respondent,

AND

THE EXCHANGE CORP., MAURICE BENJAMIN AND EDWARD LEVITT,
Defendants.

BRIEF IN OPPOSITION TO CERTIORARI.

LAWRENCE GUNNELS,
MICHAEL W. COFFIELD,
130 E. Randolph Drive,
Chicago, Illinois 60601,
Attorneys for Respondent.

Of Counsel:
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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QUESTION PRESENTED.

The sole question presented by the petition is whether the mandatory venue requirement of Section 94 of the National Bank Act (12 U. S. C. § 94), limiting the venue of actions against national banks to the districts wherein such banks are established or located, has been impliedly repealed by the Securities Acts [15 U. S. C. § 77v(a) and 15 U. S. C. § 78aa].

THE PETITION SHOULD BE DENIED.

The decision below is clearly correct and in accord with the prior decisions of this Court and of all other Circuit Courts of Appeals construing Section 94 of the National Bank Act. There is no conflict between Circuits, no question of special or recurring importance, and no other occasion to warrant review by this Court. Petitioner's plaint should be addressed to Congress.

I. THE COURTS BELOW PROPERLY APPLIED THE MANDATORY VENUE REQUIREMENT OF THE NATIONAL BANK ACT.

As both the District Court and the Second Circuit recognized below, the decided cases have repeatedly held that Section 94 of the National Bank Act is mandatory and requires that all transitory actions be brought in the district in which the national bank is established or located. *Mercantile Nat'l Bank* v. *Langdeau,* 371 U. S. 555 (1962); *Michigan Nat'l Bank* v. *Robertson,* 372 U. S. 591 (1962); *General Electric Credit Corp.* v. *James Talcott, Inc.,* 271 F. Supp. 699 (S. D. N. Y. 1966); *Cope* v. *Anderson,* 331 U. S. 461 (1946); *Bank of America* v. *Whitney Central Nat'l Bank,* 261 U. S. 171 (1923); *First Nat'l Bank of Charlotte* v. *Morgan,* 132 U. S. 141, 145 (1889); *Ruffum* v. *Chase Nat'l Bank,* 192 F. 2d 58 (7th Cir. 1951), *cert. denied,* 342 U. S. 944 (1952); *Leonardi* v. *Chase Nat'l Bank,* 81 F. 2d 19 (2d Cir.), *cert. denied,* 398 U. S. 677 (1936); *Nat'l Union Fire Ins. Co.* v. *Lippert Bros. Inc.,* 233 F. Supp. 650 (D. Neb. 1964); *International Refugee Organization* v. *Bank of America,* 86 F. Supp. 884 (S. D. N. Y. 1949); *Schmitt* v. *Tobin,* 15 F. Supp. 35 (D. Neb. 1935); *Cadle* v. *Tracey,* 4 Fed. Cas. 967, No. 2279 (C. C. S. D. N. Y. 1873).

All but one of the courts that have considered Section

94 in light of the special and different venue provisions of the Securities Acts [15 U. S. C. §§ 77v(a) and 78aa] have rejected petitioner's strained notion of "implied repeal" of Section 94. *E.g., General Electric Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699 (S. D. N. Y. 1966); *Berman* v. *Thomson and the First Nat'l Bank of Boston*, No. Dist. Ill. No. 65-C-2051 (unreported); *Wyndham Associates* v. *Bintliff*, 67 Civ. 2611 and *Friedman* v. *Bintliff*, 67 Civ. 3661 (S. D. N. Y. Nov. 8, 1967). The sole case to the contrary is *Levin* v. *Western Sugar Co.*, 274 F. Supp. 974 (D. N. J. 1967), which we submit is patently erroneous.

This Court has held on numerous occasions that, in the absence of express legislative intent to the contrary, statutes dealing with a narrow and specific problem will be held to prevail over more general provisions of another statute. *E.g., Kepner* v. *United States*, 195 U. S. 100, 125 (1904); *Rodgers* v. *United States*, 185 U. S. 83, 87-88 (1902); *Townsend* v. *Little*, 109 U. S. 504, 512 (1883). And, this Court has specifically held that where particular venue provisions have been enacted by Congress, the broader language of a general venue statute does not supersede the specific legislation even though it may be literally applicable. *Stonite Products Co.* v. *Melvin Lloyd Co.*, 315 U. S. 561 (1942); *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222 (1957).

Thus, even if there were no legislative history on the subject, we believe it plain that the overwhelming weight of authority supports the lower courts' determination that the specific venue provisions of Section 94 of the National Bank Act required dismissal of respondent from the suit.

II. SECTION 94 HAS NOT BEEN REPEALED BY THE VENUE PROVISIONS OF THE SECURITIES ACTS.

There is no evidence whatsoever of any congressional intent to repeal Section 94 of the National Bank Act either expressly or impliedly. In 1959 Congress passed 25 amendments to the National Bank Act to "clarify or eliminate ambiguities . . . [and] to repeal certain laws which have become obsolete." (1959 U. S. Code, Cong. Admin. News at p. 2232.) Signally, Congress did not see fit to modify or repeal the venue provisions of Section 94. Any argument that Congress has not paid careful and continuing attention to the specific needs of national banks in the context of other national legislation flies in the face of clear-cut congressional history. As this Court recently recognized in *First Agricultural Nat'l Bank of Berkshire County* v. *State Tax Commission*, 20 L. Ed. 2d 1138, 1141, 1143 (1968), concerning the vitality of legislation affecting national banks:

> ". . . Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed."
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> * * * * *
>
> ". . . Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular congressional concern marked by responsive legislation to new problems."

Petitioner's reliance on *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1962) is wholly misplaced. There this Court specifically held that the Securities Exchange Act was *not* so broad or pervasive as to constitute an im-

plied repealer of the antitrust laws and a consequent exemption for the New York Stock Exchange from those laws. Indeed, this Court was at pains to note in *Silver* that " '[i]t is a cardinal principle of construction that repeals by implication are not favored' " (*United States* v. *Borden Co.*, 308 U. S. 188, 198); the Court went on to hold that (373 U. S. at 357):

> "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary."

Moreover, we submit that no issue of "workability" of the Securities Acts is raised by the venue provision of the National Bank Act; nor do we believe that there is a necessary conflict between those statutes as they apply to national banks. Judge Tenney in *General Electric Credit, supra,* soundly rejected any such argument of necessary conflict and decided that, in any event, any modification of the Bank Act in light of the Securities laws was a matter for congressional determination (271 F. Supp. at 708):

> ". . . Whether valid argument exists for amendment of either the National Bank Act or the Securities Exchange Act in the light of the expanding activities of national banks is a matter for Congress to determine. Certainly, in the present posture of the record, I cannot conclude that such would be desirable, even were it within my province to so determine. Clearly both acts can exist together and their co-existence for over thirty years does not appear to have impeded in any way the enforcement of the Securities Exchange Act."

And see *Mercantile Nat'l Bank* v. *Langdeau,* 371 U. S. 555, 565-67 (1962).

CONCLUSION.

The petition should be denied.

Respectfully submitted,

LAWRENCE GUNNELS,
MICHAEL W. COFFIELD,
130 E. Randolph Drive,
Chicago, Illinois 60601,
Attorneys for Respondent.

Of Counsel:
KIRKLAND, ELLIS, HODSON,
CHAFFETZ & MASTERS.

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